IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under Article 140 of the Constitution of the Republic of Sri Lanka.

CA Writ Application
No: 402/2019

1. Divineguma Ekabadda Vruththikayinge Sangamaya
(දිවිනැගුම ඒකාබද්ධ වෘත්තිකයින්ගේ සංගමය)
No.289, Kotalawela,
Kaduwela.

2. C.P.J. Thudawahewa
No.364/15, Arauwela,
Pannipitiya.

3. S.D.S. Priyadharshani
No.108, Wickremasinghepura,
Mawathagama.

4. C.K.M. Alawaththegama
No.410/10, Mount Pleasant Estate,
Bolawatta, Kandy.

5. K. Gunatilaka
No.44, Mahanaviya Road,
Wallivala, Weligama.

-Petitioners-

Vs.

1. Director General

Department of Samurdh
Development, No. 24/4, Castle
Road, Colombo 08.

2. Commissioner General of Labour
Department of Labour,
Labour Secretariat,
No. 41, Kirula Road,
Colombo 12.

3. Director General
Department of Pensions,
Maligawatta, Colombo 10.

4. Hon. Attorney-General
Attorney General's Department,
Colombo 12.

- Respondents -

Before	:	Dhammika Ganepola, J.
Counsel	:	Dr. Sunil F.A. Cooray with Nilanga Perera for the Petitioners. Nayomi Kahawita S.S.C. for the Respondents.
Argued On	:	07.08.2024
Written Submission tendered On	:	Petitioners : 01.10.2024 Respondents : 17.12.2024
Decided On	:	19.12.2024

Dhammika Ganepola, J.

Factual Matrix

The 1st Petitioner is a registered trade union comprising approximately 8375 members who are employees of the Department of Samurdhi Development, formerly Department of Divineguma Development (hereinafter referred to as "Department"), which was established under Divineguma Act No.1 of 2013. With the enactment of the Divineguma Act, all the members of the 1st Petitioner opted to join the Department of Divineguma under Section 44(e)(ii) of the Divineguma Act.

Prior to the establishment of the Department of Divineguma Development, the members of the 1st Petitioner were employed in the Samurdhi Authority of Sri Lanka, the Southern Development Authority of Sri Lanka and the Udarata Development Authority of Sri Lanka. At the relevant times, the members of the 1st Petitioner were contributors to the Employees Provident Fund [EPF] under the Employees Provident Fund Act no 15 of 1958. The Department of Divineguma Development had been established by amalgamating the Samurdhi Authority of Sri Lanka, the Southern Development Authority of Sri Lanka and the Udarata Development Authority of Sri Lanka by the Divineguma Act.

Between April and May 2014 four Circulars i.e. 2014/01(P2a), 2014/02(P2b), 2014/3(P2c) and 2014/04(P2d) had been issued by the Department specifying the relevant options available to the officers in joining the Department. In September 2014, the employees who opted to join the Department under Section 44(e)(ii) had been issued with a formal letter of appointment. Subsequently, the 2nd Respondent by letter dated 2014.12.12 (P3a) had informed the Department that the 12% contribution by the Employer would be released to the Treasury instead of being paid out to the Employees. The Ministry of Finance and Planning also by its letter dated 20.12.2014 (P3b) indicated that aforesaid funds would be transferred to the Treasury. Thereafter, by Gazette Extraordinary No.1902/54 dated 20.02.2015 [P4], it was published that after relevant deductions for the W&OP, the 20% contribution jointly made to EPF by the officer and the Authority, would be repaid to the relevant officers. The relevant Minister also issued directions to the then Director General of the Divineguma Development Department to set off the balance payment on the same lines by letter dated 20.02.2015[P6].

The Petitioners state that the officers of the Department moved to get back the 12% State Authority share of the EPF in contravention of the said decision. However, in the Fundamental Rights Application bearing No. SC/FR/252/2015 filed by the Petitioners before the Supreme Court, the matter was settled on the following conditions:

i. Withdraw the payments necessary for the Widows and Orphans Pension required by Section 44(e)(ii) of the Divineguma Act with interest accrued on them as per the Pension Salary Circular No.03/2008 dated 30.01.2008.
ii. Withdraw any loan or advance amount obtained under the provisions of the EPF Act by the EPF beneficiary employees along with the interest on them from the EPF and
iii. Release the entirety of the rest of such money lying to the credit of their individual accounts of EPF in terms of the applicable law to the Petitioners. [see P7]

Accordingly, the Director General of Divineguma Development Department had issued a letter dated 28.09.2016 [P10] for the purpose of releasing the 20% contribution to EPF to the relevant officers.

The Petitioners state that although the EPF money was released to the members of the 1st Petitioner, the 1st Respondent Department has failed to forward the relevant files and papers of its retiring employees to the 3rd Respondent unless the said 12% of the Employers'(Government) share of the EPF of the Employees is paid back to the Department by those officers who obtained it legally on the approval of the authorities. The 1st Respondent issued Circular bearing No.3/2019 dated 04.04.2019 [P11] superseding the effect of Circulars P2(a), P2(b), P2(c), P2(d) and Circular No.16/2018 dated 30.08.2018. The Petitioners state that part (1) of the said Circular P11 has a direct application to the members of the 1st Petitioner and is purportedly designed to take away their entitlements violating the provisions of the Act and the decision of the Supreme Court[P7]. It is stated that the said act of the 1st Respondent has overstepped the powers conferred on him by the Act.

Accordingly, the Petitioners seek *inter alia,* a Writ of Certiorari quashing the Circulars marked P2(a), P2(b), P2(c), P2(d) and P11, and Writs of Mandamus directing the 1st Respondent to take steps to forward the relevant files for payment of pension without requiring the repayment of

the 12% contribution made by the employer in respect of the relevant officers and directing the 3rd Respondent to pay the pension to the relevant employees without insisting on the repayment by such employees.

Applicability of provisions of Minitue of Pensions

Section 44(e)(ii) of the Divineguma Act is as follows:

> *"44.(e) such officer or servant in the employment of the said Authorities, as at the date immediately prior to the appointed date shall-*
>
> *(ii) where such officer or servant opts to join, with effect from the date of appointment to such posts in the respective authority, the service of the Department, such officer or servant, be deemed with effect from such date of appointment and subject to the approval of the Public Service Commission, to be an officer or a servant of the Department and be eligible for a pension under the provisions of Minutes on Pensions taking into consideration the contributions made by the respective Authorities to such Provident Fund;*

The Respondents state that provisions of Section 44(e)(ii) Divineguma Act which opted the members of the 1st Petitioner to join the Department of Divineguma is subject to Sections 48(3) and 48(E)(a) of Minutes of Pensions. Said Section 48(3) is as follows;

> *48. (3) Where a contributor to any approved Provident Fund is appointed to a pensionable office in the public service and enters on the duties of such office, the period commencing on the day on which such contributor became liable to contribute to the Fund and ending on the day on which his account in the Fund is closed, shall in any case where only the amount of his own contributions to the Fund together with interest thereon is paid to such contributor out of the Fund, count as service for the purpose of the grant of any pension, gratuity or other benefit under these Minutes.*

It is argued that the Petitioners are disentitled to be absorbed under Section 44(e)(ii) of the above Act if, the Petitioners claim that they are given the 12% contribution to the EPF. As per the said Section 48(3) of Minutes of Pensions, the payment of the Pension of an employee appointed to a pensionable office can only be made if that employee has contributed to an approved Provident Fund. It is observed that Section 48(6) of the Minutes of Pensions specified two kinds of provident. Said Section 48(6) as follows:

> *48. (6) For the purposes of this section-"approved Provident Fund" means-*
>
> *(a) the Electrical Department Provident Fund; and*
>
> *(b) any Provident Fund (other than the Public Service Provident Fund) approved, for the purposes of these rules, by the Governor or, after the date of the first meeting of the House of Representatives, by the Permanent Secretary, Ministry of Public Administration, Local Government and Home Affairs, by notification published in the Gazette;*

It is on the common ground that the members of the 1st Petitioner union have contributed to the Employees Provident Fund established in terms of the Employees Provident Fund Act No.15 of 1958 and maintained by the Central Bank but not to any other approved provident fund as defined in Section 48(6) of the Minute of Pensions. Hence Section 48(3) of the Minute of Pensions does not apply to the members of the 1st Petitioner union who were absorbed under Section 44(e)(ii) of the Divineguma Act. Accordingly, 48(3) of the Minute of Pensions have no bearing on the Petitioners and the Respondents are not entitled to recover the contribution made by the Government as per the said Section 48(3).

However, the Respondents submit that Section 48E(a) provides any public servant who was a contributor to the Public Service Provident Fund is appointed to any office in respect of which a pension or gratuity payable before sending on pension should refund to the government a sum equal to the bonus or award or other benefit paid to him with simple interest on such sum. Said Section 48E(a) is reproduced as follows:

48E. (a) any public servant who was a contributor to the Public Service

Provident Fund in terms of the Public Service Provident Fund Ordinance (Chapter 434) and who, upon termination of his service as a contributor to such Fund, was granted an award under section 14 of the said Ordinance, ……

Is appointed to any office or post in respect of which a pension or gratuity is payable under these Minutes, then the period of his service during which he contributed to the Public Service Provident Fund or the approved Provident Fund, as the case may be, shall be reckoned as a period of service admissible for any pension or gratuity payable under these Minutes, if and if only, such public servant refunds to the Government, when required so to do by the Permanent Secretary, Ministry of Public Administration, Local Government and Home Affairs, a sum equal to the bonus or award or other benefit paid to the credit of the account of such public servant by the Government under section 14 of the aforesaid Ordinance or under the rules of the approved Provident Fund, as the case may be, together with simple interest on such sum at four per centum per annum from the date he received payment of that sum.

I am of the view that the term "*other benefit paid to him*" includes any statutory contributions such as EPF. Said Section 48E(a) also supports the stance taken up by the Respondents that the employees cannot obtain two different benefits [pension entitlement and EPF] awarded at the end of their employment for the same period of time as it is against public policy. Accordingly, prior to sending an employee on a pension, they are subject to a refund of the Government contribution to the EPF when required to do so as per Section 48E(a) of the Minute of Pensions.

The Relevancy of the Settlement before the Supreme Court

However, the 1st to 4th Petitioners have filed a Fundamental Rights Application bearing No.SC/FR/252/2015 before the Supreme Court claiming that their fundamental rights had been violated due to their contribution money in the EPF not being fully released to them. The parties in the above application have reached a settlement[P7]. According to the said settlement outlined in P7, the entire balance of money in the individual accounts of employees' EPF (Employee Provident Fund) will be released after deducting necessary payments for the W&OP (Wages and Overtime Payments), as well as any accrued interest. This deduction will also include any loan or advance amount obtained by employees under the EPF Act, along with the interest on those amounts.

The Respondents have taken up a stance that although approval from the Cabinet for settling litigatory matters is required before proceeding with a settlement, in the above Supreme Court case bearing No.SC/FR/252/2015, Cabinet approval has not been obtained before reaching such a settlement. However, it is observed from settlement P7 that the above application before the Supreme Court was settled on the terms as indicated by the relevant Minister. The Attorney General's representation as the Chief Legal Adviser of the Government had also been there. Further, it appears that the Respondents have not taken any steps to seek any clarification or to inform the Supreme Court after the settlement, of any alleged mistake in reaching the settlement.

It is observed that subsequently the above situation has been brought to the notice of the Attorney General by the Secretary to the Ministry of Public Administration by his letter dated 06.01.2017[P9(a)] and that advice has been sought on how to implement the terms of settlement entered before the Supreme Court. The Attorney General has responded to this letter by its letter dated 08.02.2017 [P9(b)] stating that the relevant terms of settlements were submitted to the Court on the written instructions of the relevant Minister and the relevant parties have been instructed to follow the settlement. It is noted that the aforementioned letter [P9(b)] does not indicate any obstacles to the implementation of the above settlement. As per the said settlement, the contribution to the EPF has been released to the relevant employees.

It was argued that the Director General of Pensions had not been a party to said SC/FR/252/2015 application and as such, the 3rd Respondent is not obligated to adhere to the settlement reached before the Supreme Court. Nevertheless, the Honorable Attorney General was a party to the said settlement representing the State. It is settled in our constitutional law that in matters which concern the public at large, the Attorney-General is the guardian of the public interest. As the guardian of the public interest, it is the Attorney General's duty to represent the public interest with complete objectivity and detachment. Accordingly, all government institutions are bound to follow the settlement reached by the Attorney General.

On the forgoing reasons it is my view that said submission made by Respondents in view of circumventing the settlement reached before the Supreme Court cannot be accepted.

However, it is important to consider subsequent developments in the process of recovering the contributions to the EPF by the Respondents. The Respondents state that unless the employer's contributions to the EPF of the Petitioners are paid back, the period of employment under the Samurdhi Development Authority cannot be included in the calculation of the employment period when awarding pensions.

Cabinet Decision dated 23.10.2018 [R4b]

The Petitioners assert that Part I of Circular bearing No.3/2019 dated 04.04.2019 [P11] issued by 1st Respondent Circular P11 has a direct application to the members of the 1st Petitioner. As per the said Circular, 60% of the sum in the Employees' Provident Fund under the relevant employee's name should be paid back to the Government.

The Respondents state that it has been decided by the Cabinet of Ministers on 23.10.2018 [R4b] that officers/employees who were absorbed under Section 44(e)(ii) of the Divineguma Act to be eligible for a pension, should refund the 12% contribution made by the government to the EPF together with the interest accrued thereupon, for the period he/she served earlier in the relevant Authority, back to the Government. Accordingly, Circular dated 04.04.2019 bearing No. 3/2019[P11] has been issued on the same lines with the approval of the Public Service Commission and the Department of Pension and therefore the Department of Pension must

follow the aforesaid Cabinet Decision. According to the Respondent, the rationale of the Cabinet Decision and Circular is to get back the contribution made by the State in respect of the relevant employees when they were not in a pensionable post.

The Petitioner contends that the said Circular P11 has been designed to take away the benefits obtained by the Petitioner in the above-mentioned Supreme Court case and the same is a clear violation of the provisions of the Divineguma Act. However, a Cabinet Decision cannot override a settlement entered before the Supreme Court. Because, as per the Supreme Law of the Country: the Constitution and as per the principles of separation of powers, it is only the legislature that could keep a check on the judiciary and not the executive. The Cabinet of Ministers, being an arm of the Executive under the Constitution, is not vested with the power to overturn a decision arrived at by the Supreme Court.

However, it is observed that the above Cabinet Decision [R4(b)] was followed by the Cabinet Memorandum dated 24.08.2018 [R4(a)] which was forwarded for the approval of the Cabinet referred to the settlement reached before the Supreme Court on 23.10.2018. Further, it is important to note that Term 03 of the settlement [P7] before the Supreme Court specified that any release of money lying to the credit of employees' accounts of EPF is subject to applicable law. As concluded above, prior to sending an employee on a pension, they should refund the Government contribution to the EPF when required to do so as per Section 48E(a) of the Minutes of Pension. Hence, Circular P11 that had been issued in compliance with the applicable law, cannot be considered as a violation of Settlement P7. Consequently, superseding of settlement reached before the Supreme Court by a Cabinet Decision would not arise.

The Respondents in their Statement of Objections have stated that the Petitioners except the 5th Petitioner filed an application bearing No. SCFR /144/2019 before the Supreme Court moving to have the Cabinet Decision dated 23.10.2018 [R4b] quashed. It has also been indicated that such an application was refused at the leave stage by the Supreme Court. However, it is observed that the Respondents have not taken due diligence to place materials before this Court to substantiate its said position.

Conclusion

In view of the foregoing, I hold that the Petitioners are not entitled to any of the reliefs prayed for in the prayer for the amended Petition. Accordingly, I proceed to dismiss the application. I order no cost.

Application is dismissed.

Judge of the Court of Appeal